CORRECTED COPY

No. 83-2161

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

STATE OF MONTANA, *et al.*,
Petitioners,

v.

BLACKFEET TRIBE OF INDIANS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF ASSINIBOINE AND SIOUX TRIBES OF THE FORT PECK RESERVATION, SHOSHONE AND ARAPAHOE TRIBES OF THE WIND RIVER RESERVATION, PUEBLO OF LAGUNA, NEZ PERCE TRIBE OF IDAHO, CHEYENNE RIVER SIOUX TRIBE, AND ASSOCIATION ON AMERICAN INDIAN AFFAIRS, INC. AS *AMICI CURIAE*

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31

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

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INTEREST OF AMICI

Amici, except the Association on American Indian Affairs, are federally recognized Indian tribes with tribal governments recognized by the Secretary of the Interior. Each has a direct interest in the outcome of this case

because permitting states to tax the royalty interests of tribes in leases under the Act of May 11, 1938 will or may reduce the tribes' share of revenues from existing and future mineral development on their reservations. The Association on American Indian Affairs is a non-profit membership corporation organized under the laws of the State of New York for the purpose of protecting the rights and improving the welfare of American Indians.

Amici Assiniboine and Sioux Tribes are located on the Fort Peck Indian Reservation in Northeastern Montana. There is considerable oil and gas development on the Fort Peck Reservation. Both tribal and allotted lands are under lease and producing oil and gas. Tribal income from oil and gas production in fiscal year 1984 was in excess of $820,000. Development is ongoing, and total production and tribal income should increase in the future. Since Montana is the petitioner in this case, the Tribes can expect the state to attempt to tax the Tribes' royalty income if the state prevails here.

The Shoshone and Araphoe Tribes are located on the Wind River Reservation in Wyoming. Wind River is the only Indian reservation in the State of Wyoming. There has been oil and gas leasing on the Wind River Reservation since at least 1916. Today the Tribes earn a total of about 10 million dollars a year from tribal oil and gas leases. 85% of this income, by Act of Congress, is distributed per capita to the people and 15% is reserved to the tribal government.[1] Wyoming has never sought to tax tribal royalties, but can be expected to do so if this Court rules for petitioner in this case.

The Pueblo of Laguna is located in New Mexico. The Pueblo previously has leased lands for the mining of uranium, and in the future will consider other leases for the mining of such minerals as may be found under its

[1] 25 U.S.C. § 613 (1982).

lands. The Pueblo wishes to respond to the arguments of the Petitioner as well as those of *amicus curiae* the State of New Mexico in order to protect the economic viability of any future mineral development activities within Pueblo land.

The Nez Perce Tribe of Idaho is located on a reservation in Idaho. The Tribe has leased for many years certain tribal lands for the mining of limestone, and will consider other leases for the mining of such minerals as may be found under its lands. The Tribe wishes to respond to the arguments of the Petitioner as well as those of *amicus curiae* the State of Idaho in order to protect the economic viability of any future mineral development activities on tribal lands.

The Cheyenne River Sioux Tribe is organized under the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-479 (1982), and located on the Cheyenne River Sioux Reservation in the State of South Dakota. Although no tribal lands currently are the subject of mineral leases, the Tribe wishes to protect the economic viability of any future mineral development activities on tribal lands. The Tribe filed a brief *amicus curiae* with this Court in *Solem* v. *Bartlett*, No. 82-1253, decided Feb. 22, 1984.

The Association on American Indian Affairs, Inc. is the largest Indian-interest organization in the United States, and is nationwide in scope, with a membership of 50,000 that consists of both Indians and non-Indians. The Association frequently has participated in leading cases involving issues of Indian law before the federal and state courts, including the filing of a brief with this Court in *DeCoteau* v. *District County Court*, 420 U.S. 425 (1975), and the filing of briefs *amicus curiae* in *Solem* v. *Bartlett*, No. 82-1283, decided Feb. 22, 1984, *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191 (1978), *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145 (1973), *Puyallup Tribe* v. *Department of Game*, 391 U.S. 392 (1968), and

Warren Trading Post Co. v. *Arizona Tax Commission*, 380 U.S. 685 (1965).

This brief is filed with the written consent of all parties to the litigation. The consents have been lodged with the Clerk of this Court.

SUMMARY OF ARGUMENT

In this case Montana seeks to tax the tribal royalties from oil and gas production on tribal land within the Tribe's Reservation. It is not an attempt to tax minerals owned by private persons or the oil companies' share of tribal minerals. This Court has held that States have no power to impose such taxes in the absence of an express, unambiguous waiver of the Tribe's immunity from state taxation.

There is no such waiver for leases under the 1938 Mineral Leasing Act. The 1938 Act does not by its terms authorize state taxation of minerals produced from leases under it. There is no general act authorizing state taxation of Indian minerals. The tax immunity waiver of the 1924 Act is a proviso to the leasing authority of that Act, and waives tax immunity only for leases under that Act. The 1924 Act does not cover all Indian lands and the exceptions in it are not congruent with those in the 1938 Act. The 1938 Act also contrasts with the contemporaneous Act of June 26, 1936, 25 U.S.C. §§ 501-509 (1982) which expressly authorizes Oklahoma—but no other state—to tax gross production of lands acquired under it. 25 U.S.C. § 501 (1982). Finally, the Indian Mineral Development Act of 1982, 25 U.S.C.A. § 2100-2108 (West 1983) specifically provided that nothing in it shall affect or be affected by any other Indian mineral leasing act. The pattern is clear. Each mineral leasing authority is self-contained. A lease made under any act is governed by that act, and not other mineral leasing authorities.

A waiver of the tax immunity in the 1938 Act cannot be inferred from the silence of that Act.

Contrary to the impression Montana and the *amici* states try to give, most states have not tried to tax tribal royalties unless the lease in question is made under a statute specifically authorizing such taxation. Wyoming, Idaho, and California do not tax tribal royalties. Alaska is governed by a separate regime for Native property under the Alaska Native Claims Settlement Act. A 1977 Interior Department memorandum shows that in 1977 only Montana and New Mexico were attempting to tax tribal royalties under 1938 Act leases, and New Mexico stopped after the 1977 Solicitor's opinion that such taxes were not allowed.

The primary responsibility for providing governmental services on an Indian reservation belongs to the tribe governing the reservation and to the federal government. In particular, regulation of oil and gas matters on Indian land is done by the federal and tribal governments. States have little or no role, lacking jurisdiction over oil and gas matters on Indian reservations. They are thus also relieved of the expense of such regulation. The State role in providing general services on Indian reservations is similarly limited; and where the state does provide services it often does so with federal money. The net result is that collection of state severance taxes on tribal royalties is not justified by services rendered by the states.

One of the purposes of the 1938 Act was to end the confusion in earlier conflicting and incomplete acts and to achieve uniformity in tribal mineral leasing. That purpose is reflected in the legislative history and in the structure of the Act. Applying the tax authorizations of the 1924 Act, the 1927 Act and other acts to leases under the 1938 Act would defeat this purpose. Those tax authorizations vary in scope and detail. Keeping those au-

thorizations alive under the 1938 Act would reintroduce, in the state tax area, all of the confusion of the hodge-podge of old statutes. If Congress had intended in 1938 to waive tribal tax immunity it would have adopted a specific, uniform, tax authorization.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY HELD THAT MONTANA CANNOT TAX THE BLACKFEET TRIBE'S SHARE OF INCOME UNDER 1938 ACT OIL AND GAS LEASES.

In this case Montana seeks to justify a tax against an Indian tribe's royalty on the production of nonrenewable minerals on tribal land within the Tribe's reservation. This is not an attempt to tax minerals on land owned by private persons within a reservation. Nor is it an attempt to tax an oil company's share of tribal minerals. It is an attempt by one sovereign—the State of Montana—to tax the direct income of another sovereign—the Blackfeet Tribe—from a resource that when once mined is gone forever.

The State has no power to engage in such taxation in the absence of a waiver of the Tribe's immunity by Congress. As the court held in *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 148 (1973):

> [I]n the special area of state taxation, absent cession of jurisdiction or other federal statutes, permitting it, there has been no satisfactory authority for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation, and *McClanahan* v. *Arizona State Tax Comm'n.*, *supra*, lays to rest any doubt in this respect by holding that such taxation is not permissible absent congressional consent.

See also, *McClanahan* v. *State Tax Commission*, 411 U.S. 164, 175 (1973).

A. The standard for finding a waiver of tribal tax immunity is that the waiver be unambiguous.

This Court in *Bryan* v. *Itasca County*, 426 U.S. 373 (1976), set the standards for finding a waiver of a tribe's immunity from state taxation. There the Court was asked to hold that § 4 of Public Law 280,[2] which subjected Indian tribes to the civil and criminal jurisdiction of certain states, also subjected property of tribal members located on reservations to the states' taxing authority. The Court cited the familiar standard of interpretation that "statutes passed for the benefit of dependent Indian tribes . . . are to be liberally construed, doubtful expressions being resolved in favor of the Indians." *Id.* at 392. The Court held that this "principle of statutory construction has particular force in the face of claims that ambiguous statutes abolish by implication Indian tax immunities." *Id.*

It is that standard that must be applied here. The basic starting point is that a state has no authority to tax a tribe's royalty on production of its own minerals. If Congress has waived the tribe's tax immunity it must be a clear and precise waiver, not an implication from an ambiguous statute. Montana has the burden of showing such a clear and precise waiver. We submit that there has been no such waiver.[3]

B. Congress has not waived tribal immunity from state taxes on tribal royalty interests under 1938 Act mineral leases.

Tribes do not have authority to sell or lease their land except as provided by acts of Congress. *Oneida Indian*

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[2] Act of August 15, 1953, c. 505, 67 Stat. 589. Section 4 of the Act is codified at 28 U.S.C. § 1360 (1982). Amendments made in 1968 are codified at 25 U.S.C. §§ 1321-1326 (1982).

[3] The presumption against a waiver of immunity should be even stronger when, as here, a state seeks to tax a nonrenewable resource from trust land. Cf. Squire v. Capoeman, 351 U.S. 1 (1956). In *Squire*, despite the plenary authority of Congress to tax within an Indian reservation, and the general applicability of federal in-

Nation v. *County of Oneida*, 414 U.S. 661, 667-676 (1974); 25 U.S.C. § 177 (1982). A lease of Indian land is therefore based on an act of Congress that permits such a lease. See 25 U.S.C. § 177; *see also*, discussion in F. Cohen, *Handbook of Federal Indian Law* (1982 ed.), at 528-542. The 1938 Indian Mineral Leasing Act, 25 U.S.C. §§ 396a-396g (1982), is such an authorization and numerous mineral leases have been made under it. Not one word in the Act permits state taxation of leases made under the Act or makes such taxation a condition for permitting the lease. Nor does the legislative history of the Act show an intent to authorize taxation of royalties produced under the Act. The legislative history is silent on this.

The 1938 Act, though of wide application, does not purport to cover all Indian lands. Section six lists lands to which it does not apply. Where those lands are concerned one must refer to the statutes permitting them to be leased to determine the extent of leasing authority. Thus there is no single statute on mineral leasing. Each lease is governed by the statute under which it is made.

Similarly, there is no general statute permitting states to tax tribal revenues from leases. The 1924 leasing statute, 25 U.S.C. § 398 (1982), does contain a permission to tax, but only as a proviso to that leasing statute. The proviso does not purport to be a general waiver of tribal tax immunity, but only a condition for leasing under that statute. Indeed the 1924 Act, like the 1938 Act, does not cover all Indian lands, and the exceptions in one

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come tax laws to Indiana, the Court held that income from timber cutting on allotted lands was not subject to federal income taxation. (The United States never attempted to tax timber cutting on tribal lands). The Court relied on the fact that

> "[r]espondent's timber constitutes the major value of his allotted land * * *. Once logged off, the land is of little value." *Id.*, at 10.

act are not congruent with the exceptions in the other.[4] To apply the specific tax provisions of the earlier act to the later one would preserve and add to the haphazard state of things Congress hoped to obviate with the 1938 Act. *See* discussion in Section IV, *infra*.

The 1938 Act contrasts not only with the 1924 Act, but with the contemporaneous Act of June 26, 1936, c. 831, 49 Stat. 1967, codified at 25 U.S.C. §§ 501-509 (1982), which permits acquisitions of grazing land for Indian tribes and specifically provides that the state of Oklahoma —but not any other state—may tax the gross production of oil and gas from such lands. 25 U.S.C. § 501 (1982). Thus Congress, in the 1930's, when it wanted to waive a tax immunity, did it precisely. Not only does the 1938 Act fail to expressly waive tribal immunity, the express waiver in the 1936 Act argues against a tacit waiver in the 1938 Act.

Finally, Congress, in its most recent legislation on Indian mineral leases, has tried expressly to avoid the application of one act to the provisions of another. In the Indian Mineral Development Act of 1982, 25 U.S.C.A. §§ 2101-2108 (West 1983) which provides more flexible arrangements for mineral production than ordinary leases, Congress—probably to avoid litigation such as this —specifically provided that nothing in the Act shall affect or be affected by any other Indian mineral leasing act.

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[4] The 1924 Act is an amendment to an 1891 Act that allows mineral leasing on lands "bought and paid for" by the Indians. The meaning of that phrase has never been clear. It is not a term of art in Indian law. See discussion at 20-21, *infra*. The exceptions in the 1938 Act are the Papago Indian Reservation in Arizona, the Crow Reservation in Montana, the ceded lands of the Wind River Reservation in Wyoming, the Osage Reservation in Oklahoma, and the coal and asphalt lands of the Choctaw and Chickasaw Tribes in Oklahoma. 25 U.S.C. § 396f (1982).

The pattern over many years is clear. Each mineral leasing authority is self-contained. A lease made under any act is governed by the provisions of that act, including the tax provisions, and not by provisions from other mineral leasing authorities. Tribes, states and oil companies are all used to leases and other mineral development agreements being governed by the act under which they are made.[5]

Montana's argument is that a tribe's royalty from a lease under the 1938 Act can be taxed by the state because the 1938 Act—while containing no waiver of tax immunity as in the 1936 Act—does not specifically repeal the 1924 Act waiver of tax immunity.

For the State to prevail requires the Court to find an inference from silence that a tribe's tax immunity has been waived. This argument, we submit, does not pass the test set forth by this Court in *Bryan* v. *Itasca County*, 426 U.S. 373 (1976), a test consistent with 150 years of the Court's interpretation of Indian statutes and treaties. The 1938 Act is a "statute[] passed for the benefit of dependent Indian tribes." It is "to be liberally construed, doubtful expressions being resolved in favor of the Indians." That we are dealing with an argument that a tax immunity has been waived by Congress does not diminish the application of the rule. To the contrary, "this principle of statutory construction has particular force in the face of claims that ambiguous statutes abolish by implication Indian tax immunities." *Bryan* v. *Itasca County*, *id.*, at 392.

[5] In this context, the meaning of the repealer clause of the 1938 Act seems clear. Act of May 11, 1938, c. 198, § 7, 52 Stat. 347, 348. In the absence of a repealer clause the 1938 Act might be construed as nonexclusive, leaving tribes and the Secretary the option of leasing under other statutes, such as the 1924 Act, where it suited them. This would be inconsistent with the policy of uniformity reflected in the 1938 Act. See Section IV, *infra*.

On the other hand, an outright repeal of existing statutes might be interpreted as requiring application of the 1938 Act to existing leases under the earlier statutes.

II. THE ATTEMPT TO TAX TRIBAL ROYALTY INCOME UNDER THE 1938 ACT LEASES IS LARGELY A MONTANA PHENOMENON.

Contrary to the impression Montana and the *amici* states try to give, most states have not tried to tax tribal royalties unless the lease in question is made under a statute specifically authorizing such taxation. Indeed, Montana's attempts to tax the royalty interests of Indian tribes in Montana under the 1938 Minerals Leasing Act are virtually unique.

The states of New Mexico, Arizona, Alaska, California, Idaho, Utah and Wyoming have filed an *amicus* brief in support of Montana. They state that "[o]f the amici states, New Mexico and Utah do not impose their taxes on the royalty share." *Brief* at 23. The impression is given that the other states do. But the *amici* states cite no authority to show that any of the other states (beside Montana) attempt to tax tribal royalties from oil and gas production. In fact, so far as we can determine, none of the *amici* states tax tribal royalties under 1938 Act leases.

Two of the *amici tribes*, the Shoshone and Arapahoe Tribes of the Wind River Reservation, are the only tribes in Wyoming. Oil has been produced on the Wind River Reservation by leases made under the 1891 Act, the 1916 Act and the 1938 Act. Wyoming has had severance taxes at least since 1920. Wyo. Stat. §§ 2906-2911 (1920 Comp.). It has been the uniform practice in Wyoming for oil companies to pay state taxes on their own share of royalties, but not on the tribal share. We know of no instance in which the Tribes or oil companies have paid state taxes on the Tribes' share of royalties.[6]

[6] The Wyoming tax on the value of oil produced used to support the state oil and gas conservation commission expressly exempts

Another of the *amici* states, Idaho, also does not tax the tribal share of mineral royalties. Thus Idaho has never sought to tax the tribal share of mineral development on the reservation of *amicus* Nez Perce Tribe.

California, in addition to joining in the general states' *amicus* brief, filed a separate *amicus* brief. California states that "unlike Montana and the other amici states, [it] does not have a mineral severance tax, and little if any Indian trust land in California is subject to mineral leases executed under the 1924 and 1938 Acts. Whether Indian mineral royalties from such leases may be taxed by the states is therefore not a matter of direct present concern to California." *Brief* at 2-3. California's concern is that the Court not decide this case so broadly as to invalidate its taxes on non-Indian purchasers of Indian timber. *Id.*, at 1-2.

Alaska has a separate regime for native property. Native regional corporations and village corporations largely replace the more traditional Indian tribes and trust property. The Alaska Native Claims Settlement Act (ANCSA) provides explicitly and in detail what interests in real estate or minerals shall or shall not be subject to state and local taxation. 43 U.S.C. § 1620 (1982).

In a Memorandum of March 13, 1978 to the Associate Solicitor for Indian Affairs from the Assistant Secretary of Indian Affairs, the area offices of the Bureau reported to the Secretary on whether "taxes are paid on tribal royalty income from 1938 Act leases." [7]

The survey shows that the only states attempting to collect taxes on the tribes' royalty share of 1938 Act

"the interest of any Indian or Indian tribe in any oil or gas or in the proceeds thereof, produced from land subject to the supervision of the United States." Wyo. Stat. § 30-5-116(b)(ii).

[7] We are lodging a copy with the Clerk and mailing copies to the parties and other *amici*.

leases were Montana and New Mexico. New Mexico stopped after the Solicitor's 1977 opinion that such taxes were not owed. Brief of the State of New Mexico, *et al.*, as Amici Curiae 23 n.23. According to the report, Arizona, for instance, like Wyoming, collected severance taxes on the oil companies' share of production from tribal land (often seven-eighths of the production) but not on the tribe's share.[8]

In sum, it has been the common practice of the states not to attempt to tax a tribe's royalties on production of its own minerals except under statutes specifically authorizing such taxation.

III. TAXATION OF TRIBAL ROYALTIES IS NOT JUSTIFIED BY GOVERNMENTAL SERVICES PROVIDED BY THE STATES TO THE TRIBES.

The primary responsibility for providing governmental services on an Indian reservation belongs to the Tribe governing the reservation and to the federal government. Thus, as this Court has had occasion to recognize in the past, the states have little to do with services on Indian reservations. *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, 150-151 (1980); *Moe* v. *Salish & Kootenai Tribes*, 425 U.S. 463, 476 (1976); *McClanahan* v. *State Tax Commission*, 411 U.S. 164, 173 n.12 (1973); *Warren Trading Post* v. *Arizona Tax Commission*, 380 U.S. 685, 690-91 (1965).

Only taxes on *tribal* royalties are at issue here. Taxes on royalties of individuals, or on oil companies' shares

[8] Memorandum of March 13, 1978 to Associate Solicitor for Indian Affairs from Assistant Secretary—Indian Affairs, p. 3; Personal Communication from Anita Voght, Office of the Solicitor, Department of the Interior.

The States' *amicus* brief says that Arizona collects a tax from the tribal share pursuant to Industrial Uranium Co. v. State Tax Commission, 367 P.2d 1013 (1963). That case held that a tax based on the full value of uranium production could be imposed on the lessee, not on the tribe. *Id.* at 1014.

of production are not at issue. As to the Tribe, Montana is in the anomalous position of seeking to tax an entity whose existence and role as primary provider of governmental services on the reservation relieves the state of significant burdens and expense. The State provides no services to Indian tribes which would justify or support this tax.

Oil and gas development on Indian reservations is regulated by the Department of the Interior, acting through the Bureau of Land Management. 43 C.F.R. Part 3160.[9] The Interior regulations are comprehensive. They govern spacing, location and drilling of wells, 43 C.F.R. § 3162.-3-1, subsequent well operations, 43 C.F.R. § 3162.3-2, recordkeeping and reporting, 43 C.F.R. § 3162.4-1 to 3162.4-3, and well abandonment, 43 C.F.R. § 3162.3-4. Operators are required to comply with environmental standards to prevent damage to the surface, subsurface resources, and groundwater supplies, and to take precautions to prevent blowouts, fires, and spills. 43 C.F.R. § 3162.5-1 and § 3162.5-2. Additionally, the regulations impose security requirements to prevent theft or loss of oil or gas. 43 C.F.R. § 3162.7-4.

In addition to this comprehensive federal regulation, some tribes have established their own agencies to oversee oil and gas operations on their reservations. For example, the Shoshone and Arapahoe Tribes have, since 1981, jointly maintained a Minerals Department on the Wind River Reservation. That Department had a budget of $146,000 in 1984. Shoshone Business Council, Resolution No. 5452 (Jan. 24, 1984); Shoshone Business Council, Budget Narrative CY 1984. In addition, the Shoshone Tribe funds its own oil and gas commission, with a 1984 budget of more than $40,000, *id.*, and has its own attorneys and mineral consultants to negotiate leases, arrange for competitive bidding for leases and enforce compliance with lease terms. At Fort Peck, the tribes have had a minerals office since about 1976. This office had a 1984 budget of approximately $200,000. Personal Communication from Larry Wetsit, Director, Fort Peck Minerals Office (December 10, 1984). Fort Peck similarly provides its own attorneys and mineral consultants.

[9] 43 C.F.R. Part 3160 used to be codified as 30 C.F.R. Part 221 (1982). *See* 47 Fed. Reg. 47758 (1982); 48 Fed. Reg. 35641 (1983); 48 Fed. Reg. 36583 (1983). The standard lease form used for leases under the 1938 Act specifically referred to and required compliance with 30 C.F.R. 221. These regulations also govern leases on allotted lands. 43 C.F.R. § 3160.0-1.

By contrast, the states have almost no role in oil and gas regulation on reservations. The Montana Oil and Gas Board by its own admission has no jurisdiction over Indian trust lands.[10] *Assiniboine and Sioux Tribes* v. *Board of Oil and Gas Conservation*, No. CV-83-79-GF (November 7, 1983) (consent judgment); *See Assiniboine and Sioux Tribes* v. *Calvert Exploration Co.*, 223 F.Supp. 909 (D. Mont. 1963), *reversed on jurisdictional grounds sub nom. Yoder* v. *Assiniboine and Sioux Tribes*, 339 F.2d 360 (9th Cir. 1964). Similarly, the State of Wyoming does not exercise or claim jurisdiction over oil and gas production on Indian lands. Wyoming recently correctly declined to assert jurisdiction under the Safe Drinking Water Act, 42 U.S.C. 300f-300j-10 (1982), to regulate underground water injection for oil and gas and other purposes on the Wind River Reservation. *See* 48 Fed. Reg. 40098, 40100 (1983). As a result the EPA administers the underground injection control program

[10] One of the taxes directly at issue in this case, the oil and gas conservation tax, is an earmarked tax to support the activities of the Montana Board of Oil and Gas Conservation. Montana Code Annotated, § 82-11-131. If this tax is upheld, Montana will be taxing Indian tribes specifically to support a state regulatory agency which lacks jurisdiction over Indian land, an ironic result indeed.

on the Wind River Reservation. *Id.* at 40099.[11] In fact, the states do not have any jurisdiction over environmental programs, related to mineral development or otherwise, on Indian reservations. The EPA has realized this, and recently issued a policy statement recognizing tribal governments as the primary regulators of reservation environments. Environmental Protection Agency, Policy for the Administration of Environmental Programs on Indian Reservations (Nov. 8, 1984). In short, the states lack jurisdiction to regulate oil and gas development on Indian trust lands. Such regulation is the responsibility of the United States and the tribes. The states are thus relieved of the expense of such regulation.[12]

Nor are taxes on tribal royalties justified by other general services provided by the state. Again, the tribes themselves and the federal government are the primary providers of governmental services to reservation Indians. The Bureau of Indian Affairs, and tribal governments operating under BIA contracts, run schools for Indian students on many reservations. F. Cohen, *Handbook of Federal Indian Law* 678-83, 694-95 (1982 ed.). The Indian Health Service provides all the basic health care for reservation Indians. *Id.* 698-700. The Bureau of Indian Affairs provides general assistance and other welfare benefits. *Id.* at 702-03. Low income housing on Indian reservations is also the responsibility of the federal government and Indian Housing Authorities chartered under tribal law. *Id.* at 706-11.

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[11] Montana elected not to implement an underground injection control program at all. Consequently EPA administers the UIC program throughout the state of Montana. *Id.*

[12] The Brief of the States of New Mexico, *et al.*, as Amici Curiae at 19-20, suggests that states conduct onsite inspections of mining operations on Indian lands. It cites no specific instances. We question whether the states have jurisdiction to conduct such inspections. In any event no such inspections occur on trust lands on the reservations of *amici*.

The state role is limited. And when the state does provide services, it often does so with federal money. For example, no fewer than four federal programs support state and local educational services for Indians. The Johnson O'Malley Act, 25 U.S.C. § 452 (1982), which was passed in 1934, only four years before the 1938 Act, was designed to "accommodate unmet financial needs of school districts related to the presence of large blocks of nontaxable Indian-owned property in the district * * *." 25 C.F.R. § 33.4(b) (1958 ed.).

The local school districts now receive major support under the Federally Impacted Areas Act, 20 U.S.C. §§ 236-244 (1982). That act provides support to school districts which provide education for children residing on federal property, and expressly includes Indian trust lands. 20 U.S.C. § 244 (1982). Johnson O'Malley funding is used to fund additional programs to meet the special needs of Indian students. F. Cohen, *Handbook of Federal Indian Law* 684-88 (1982 ed.).

School systems may also receive funds under the Indian Education Act, 20 U.S.C. §§ 241aa-241ff (1982). Finally, school districts may receive funds under the School Facilities Construction Act of 1953, 20 U.S.C. §§ 631-647 (1982), for the construction of schools on or near Indian reservations. Thus capital as well as operating expenses of state and local education for Indian children, if such services are provided at all, are federally subsidized.

The net result is that the tribal and federal governments provide, and thereby relieve the state of providing, services which cost considerably more than any severance tax on tribal royalties would collect in revenue.

For example, the tribal royalties from oil and gas leases at Fort Peck in fiscal year 1984 totaled $828,711. Department of the Interior, Minerals Management Service, Financial Distribution Report, Producing Oil and Gas Leases, BIA, Fort Peck Agency Office, 1984 Fiscal

Year Summary. If 100% of this royalty is retained by the Tribe it does not suffice to provide the services needed by tribal people. In fiscal year 1984 the Fort Peck Agency of the Bureau of Indian Affairs budgeted $680,000 for law enforcement and tribal courts, about $1.4 million for social services and welfare, about $147,000 for employment development and vocational training, about $229,000 for road maintenance, and about $124,000 for housing. Bureau of Indian Affairs, Fort Peck Agency F.Y. 1984 Allocation. This budget for governmental services totaling in excess of 2.5 million dollars was expended either by the BIA or by the tribal government. In addition, the Indian Health Service of the federal government in fiscal year 1984 provided or funded medical services to Indians of Fort Peck in excess of 2.8 million dollars. Personal Communication from Administrative Officer, Indian Health Services, Fort Peck Indian Reservation (December 5, 1984).

The State of Montana and its local subdivisions received $191,662 in Johnson O'Malley funding for educational services it provides at Fort Peck. Personal Communication from Vernon Belguard, Bureau of Indian Affairs, Billings Area Office, Office of Education (December 5, 1984).[13] Thus the total tribal and federal services at the Fort Peck Reservation are many times larger than the *total* tribal royalty. If Indian tribes are ever to obtain self-sufficiency there is no room for state taxation of tribal royalties.

Similarly at Wind River, the total fiscal year royalty income for both the Shoshone and the Arapahoe Tribes was $10,840,379. Department of the Interior, Minerals

[13] In addition to Johnson O'Malley funds for educational services actually provided, the State of Montana has an administrative grant of $20,000 to support its Office of Indian Education. *Id.*

Amici do not know how much federal funding the State and local governments receive under other programs on account of educational or other services to Indians at Fort Peck.

Management Service, Financial Distribution Report, Producing Oil and Gas Leases, BIA, Wind River Agency Office, 1984 Fiscal Year Summary. Of this amount 85% is required by law to be distributed per capita to members of the two tribes. 25 U.S.C. § 613 (1982). This distribution itself reduces the need for state services such as welfare by providing income to tribal members. The 15% remaining for tribal government is approximately $1.6 million.

The 1984 calendar year budget for the Shoshone Tribe includes approximately $98,000 for welfare and general assistance, $12,000 for fire protection, $82,000 for education (scholarships and on-the-job training), $30,000 to operate a nursing home for tribal members, $148,000 to operate three community centers, and $15,000 for upkeep of the tribal cemetery. Shoshone Business Council, Resolution No. 5452 (Jan. 24, 1984). Including all costs of tribal government the total tribal budget for 1984 is $2,140,851, plus an additional $267,146 for the Shoshone share of joint programs with the Arapahoe Tribe. *Id.*

The Arapahoe Tribe provides similar governmental services. The total budget for 1984 is $1,805,000 including the Arapahoe share of joint programs with the Shoshone Tribe. Arapahoe Business Council, Resolution No. 5425 (Jan. 21, 1984).

Finally, the federal government provides extensive services on the Reservation. The Indian Health Service alone provides nearly $5,915,000 in health care services at Wind River. Personal Communication from Administrative Officer, Indian Health Services, Wind River Reservation (December 5, 1984). The State and local governments receive about $136,000 in Johnson O'Malley funding alone for educational services to Indian children.[14]

[14] *Amici* do not know how much federal funding Wyoming, and its local governments, received under other programs on account of educational or other services to Indians at Wind River.

Bureau of Indian Affairs, Budget Justification, F.Y. 1985 at 54.

Thus, the services provided by the tribes and the federal government cost in excess of 7 million dollars. The cost of these services is more than four times the tribal governmental share of the Tribes' royalties from oil and gas leases. These are services the state and local governments are not required to provide. Wyoming's severance taxes total about 13.5%.[15] If these taxes were applied to the Tribes' income of $10.8 million, 15% of which goes to tribal government, the state would be collecting a sum only slightly less than the entire oil income received by the tribal government.

In short, services on the Reservation are provided by the tribal government and the United States. The state is relieved of this burden both by federal programs and by tribal programs financed by royalty income. To permit a state to tax the tribes' own royalties allows it to tax the very funds that save it and the United States from further burdens of service. No such intent can be found in the 1938 Act or inferred from it. Indeed the 1938 Act was passed after Congress had provided for the revitalization of tribal governments in the 1934 Indian Reorganization Act. There is no reason to assume that Congress in the 1930's intended to allow states to tax away the tribes' few sources of income, while reestablishing tribal governments as the governments of the reservations.

IV. THE 1938 ACT POLICY OF UNIFORMITY IN MINERAL LEASING WOULD BE DEFEATED IF TAX AUTHORIZATIONS FROM OTHER STATUTES ARE APPLIED TO THE 1938 ACT.

One of the purposes of the 1938 Mineral Leasing Act was to end the confusion in earlier conflicting and incom-

[15] *See* Wyo. Stat. § 39-6-302; Wyo. Stat. § 39-2-402; Wyo. Stat. § 30-5-116(b)(ii). The exact taxes depend on the amount of the mill levies by county and local governments pursuant to Wyo. Stat. § 39-2-402.

plete acts. From 1875 to 1924 Congress by special acts authorized leases on eleven separate reservations. *See* F. Cohen, *Handbook of Federal Indian Law* 327 (1942 ed.). Beginning in 1891, Congress also enacted a variety of more general leasing acts, which authorized leases of various minerals on various tribal lands.

It was to clear away the confusion resulting from this multiplicity of statutes and establish a uniform policy applicable to the majority of tribal lands that the 1938 Act was enacted. As the then Secretary of the Interior put it:

> Under section 26 of the act of June 30, 1919 (41 State. 31), as amended, leases for minerals other than oil and gas may be made on any reservation in the States of Arizona, California, Idaho, Montana, Nevada, New Mexico, Oregon, Washington, or Wyoming. Under the provisions of section 3 of the act of February 28, 1891 (26 Stat. 783), as amended May 29, 1924 (43 Stat. 244) leases for oil, gas, and other minerals may be made with the consent of the tribal council on treaty reservations in all States. Section 16 of the Indian Reorganization Act, approved June 18, 1934 (48 Stat. 934), provides that organized Indian tribes shall have the power to prevent the leasing of tribal lands. Under section 17 of that act Indian tribes to which charters of incorporation issue are empowered to lease their lands for periods of not more than 10 years. There is at present no law under which Executive order lands may be leased for mining, outside of the States mentioned in the act of June 30, 1919, except for oil and gas mining purposes, unless the tribes are hereafter qualified under sections 16 and 17 of the Indian Reorganization Act. *One of the purposes of the legislation now proposed, therefore, is to obtain uniformity so far as practicable of the law relating to the leasing of tribal lands for mining purposes.*

Letter of June 17, 1938, from Charles West, Acting Secretary of the Interior to the President of the Senate and

the Speaker of the House, reproduced in S. Rep. No. 985, 75th Cong., 1st Sess. 1-2, and H. Rep. No. 1872, 75th Cong., 3d Sess. 1 (emphasis added).

This quest for uniformity is also reflected in the structure of the Act. The 1938 Act is a detailed leasing statute which incorporates provisions from earlier statutes as appropriate,[16] but also contains provisions which had been left to administrative regulation or executive discretion in earlier statutes.[17] Where Congress felt particular circumstances overrode the need for uniformity, lands were specifically exempted from its provisions. 25 U.S.C. § 396f (1982).

Applying the tax authorizations of the 1924 Act, the 1927 Act and other acts to leases under the 1938 Act would reintroduce, in the state tax area, all of the variety and confusion of the hodgepodge of old statutes. For example, the scope of the tax authorization in the 1924 Act depended on the meaning of the phrase "lands occupied by Indians who have bought and paid for the same" in the Act of February 28, 1891, c. 383, § 3, 26 Stat. 795, codified at 25 U.S.C. § 397 (1982). That phrase is obscure to say the least, and its meaning never has been authoritatively determined.[18] It has been interpreted to mean all treaty reservations. Letter of June 17, 1937 from Charles West, *quoted supra*, at 19. On the other hand, the phrase was used in the 1880's to distin-

[16] For example, the maximum term of the lease—10 years and so long thereafter as minerals are produced in paying quantities—and the requirement of public auctions, 25 U.S.C. §§ 396a, 396b, are similar to requirements of the 1924 Act. 25 U.S.C. § 398 (1982).

[17] E.g., provisions regarding performance bonds, 25 U.S.C. § 396c, and unit agreements, 25 U.S.C. § 396d.

[18] In British American Oil Producing Co. v. Board of Equalization, 299 U.S. 159, 164 (1936), this Court noted the agreement of the parties (which did not include the Blackfeet Tribe) that the land on the Blackfeet Reservation was "bought and paid for."

guish lands in Indian country (now Oklahoma) purchased by various tribes from the Cherokee Nation from normal Indian lands, whether held by treaty or executive order. *E.g.*, Sen. Ex. Doc. No. 17, 48th Cong., 2d Sess. (1885). Nor is it clear that the phrase would apply to lands for which the Indians gave *no* consideration, even if those lands are protected by a treaty. Moreover, the phrase was probably stretched beyond its intended meaning in the early part of this century because of the absence of other leasing authority. The sooner the 1891 statute is allowed to die a natural death the better.

The confusion created by keeping the 1924 Act alive (except perhaps for leases made under it) is compounded because the scope of the taxation authorization in the 1924 Act varied from that contained in the 1927 Act authorizing leasing on Executive Order Reservations. The 1924 Act permitted taxation of "the production of oil and gas and other minerals on such lands [i.e., lands bought and paid for and leased under the 1924 Act]" and authorized payment of such taxes by the Secretary of the Interior from tribal royalties. 25 U.S.C. 398 (1982). By contrast the 1927 Act permitted taxation not only of royalties but of "improvements," "rentals" and "bonuses," 25 U.S.C. § 398c (1982), while the 1924 Act did not. If the 1938 Act tacitly incorporated these provisions, did it incorporate two conflicting tax statutes, or retain accidental differences for reservations of different origin?

In sum, if the tax authorizations of the 1924 Act and the 1927 Act are tacitly included in the 1938 Act the taxability of 1938 Act leases would depend on whether the lands in question were "bought and paid for," were on an Executive Order Reservation or were neither and whether the tax was within the scope of the particular authorization statute relied upon. All of the complications of the many different leasing authorities would not only be preserved for leases under those acts but would be imported into the 1938 Act, contrary to its purpose of

achieving uniformity for leases subsequent to its enactment.

If Congress had intended that 1938 Act leases be subject to state severance taxes it could easily have selected a tax provision from an earlier statute, or drafted a new one, and expressly incorporated it, as it did with other provisions of the 1938 Act.

CONCLUSION

The Ninth Circuit was correct in holding that the 1938 Act does not make the state tax authorization of the 1924 Act applicable to 1938 Act leases. The decision below should be affirmed.

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